

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ROBERTO ESQUIVEL CABRERA, #41078-018

PETITIONER

VERSUS

CIVIL ACTION NO. 5:08cv193-DCB-MTP

BRUCE PEARSON

RESPONDENT

ORDER

This cause comes before this Court on Petitioner's responses [18, 23 & 25] to the orders [17, 19 & 22] of this court. The orders [17, 19 & 22] of this court were entered as a result of the order of remand [16] issued by the United States Court of Appeals for the Fifth Circuit on November 12, 2008. The Fifth Circuit determined that the notice of appeal [10] filed by the Petitioner would be treated as a motion to reopen the time to file a notice of appeal. (Order [16] entered November 12, 2008). Therefore, the Fifth Circuit remanded this case for this court to make the following determinations: "the circumstances under which the appellant received notice that the final judgment had been entered, when he received that notice, if he used the prison mail system to mail his notice of appeal and motion to reopen and, if so, when he placed them in the mail, and whether any party would be prejudiced." (Order [16] entered November 12, 2008.).

In his response [25] filed February 2, 2009, petitioner states that he received the final judgment on September 23, 2008. The delay in receiving the final judgment was because "the prison mail room failed to make it available" to the petitioner on time. The petitioner states in his response [18] filed December 9, 2008, that he did use the prison mail system to mail his notice of appeal. Furthermore, the petitioner states in his response [23] that he placed the "letter" in the mail on September 30, 2008. Finally, the petitioner states in his response [18]

that no party would be prejudiced if the motion to reopen the time to file the notice of appeal was granted.

Having considered the petitioner's responses and applying the requirements of FED. R. APP. P. 4(a)(6) , this Court finds that the petitioner's motion to reopen the time to file the notice of appeal is granted and the filing of the notice of appeal on October 1, 2008, is deemed timely. Accordingly, it is

ORDERED:

1. That the petitioner's motion to reopen the time to file an appeal is granted and the notice of appeal filed October 1, 2008, is deemed timely.
2. That the clerk is directed to return this case to the United States Court of Appeals for the Fifth Circuit as directed in the order of remand [16] entered on November 12, 2008.

This the 11th day of February, 2009.

s/ David Bramlette
UNITED STATES DISTRICT JUDGE